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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 259

GLEN CONNER,

Petitioner,

versus

CITY OF HAMMOND,

Respondent.

Petition for Writ of Certiorari to Review Judgment of the Twenty-First Judicial District Court for the Parish of Tangipahoa, State of Louisiana.

PETITION FOR CERTIORARI.

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No.

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Petition for Writ of Certiorari to Review Judgment of the Twenty-First Judicial District Court for the Parish of Tangipahoa, State of Louisiana.

PETITION FOR CERTIORARI.

OPINIONS DELIVERED IN THE COURTS BELOW.

MAY IT PLEASE THE COURT:

The Judgment of the City Court of Hammond whereby Petitioner was initially convicted of violating the Obscenity Ordinance of the City of Hammond and sentenced to pay a fine of $100.00 and costs or serve 30 days in jail is not reported. No separate opinion was delivered by the Court, the verdict ap-

pearing only in the Minutes of the City Court of Hammond of date May 5, 1965 (Appendix "A" page 27).

Appeal was lodged with the Twenty-first Judicial District Court for the Parish of Tangipahoa which Court affirmed the conviction and sentence of the City Court of Hammond. There is no reported opinion, the verdict appearing only in the Minutes of the Twenty-first Judicial District Court for the Parish of Tangipahoa of date December 1, 1966 (Appendix "B" page 29). The Court did render written Reasons for Judgment (Appendix "C" page 31).

The Judgment of the Twenty-first Judicial District Court for the Parish of Tangipahoa of date December 1, 1966, was amended by the Court on January 27, 1967, to the extent that the Court found that the October, 1964 issue of PLAYBOY magazine was not obscene. The Amended Judgment appears as Appendix "D" page 36.

The Judgment of the Twenty-first Judicial District Court for the Parish of Tangipahoa of date December 1, 1966, as amended on January 27, 1967, was further amended by the Court on March 8, 1967, to the extent that the Court found that "NUDISM TODAY—OFFICIAL CALENDAR" and "URBAN NUDIST—Issue 14" were not obscene. The Further Amendment of Judgment appears as Appendix "E" page 37.

Application for Writ of Certiorari and Review was filed with the Supreme Court of the State of Louisiana, which Court refused the Writs on March 27, 1967 (Ap-

pendix "F" page 38). The Refusal of Writs is reported unofficially in 196 So. (2d) 267 (March 27, 1967). The official Louisiana Reports citation is not yet available.

JURISDICTION.

The Judgment and Decree which Petitioner seeks to have this Honorable Court review is the Judgment of December 1, 1966, as amended on January 27, 1967, and as further amended on March 8, 1967, of the Twenty-first Judicial District Court for the Parish of Tangipahoa.

Following the rendering of Judgment of December 1, 1966, Petition for Rehearing was applied for (Tr. 143) and was refused as reflected by the Minutes of the Twenty-first Judicial District Court for the Parish of Tangipahoa of date December 1, 1967 (Tr. 147). (All transcript references quoted in this Petition, except where otherwise indicated, are references to the duplicate certified copy of the record in *City of Hammond vs. Glen Conner*, No. 48,635 Supreme Court of Louisiana, since the copy of transcript of the Twenty-first Judicial District Court and the Index thereto have not been completed at the time of the preparation of this Petition for Certiorari. The Louisiana Supreme Court record contains all documents and pleadings contained in the District Court record.)

Notice of Intention to Apply to the Louisiana Supreme Court for Writs of Certiorari and Review was filed with the District Court on December 1, 1966 (Tr.

152) and on the same date Order was entered by the Court staying the sentence pending the filing of Application for Writs and granting the Defendant until February 1, 1967, within which to file Application for Writs to the State Supreme Court. By Orders of the District Court of date January 27 and March 14, 1967, the time for filing Application for Writs to the Louisiana Supreme Court was extended through March 15, 1967.

On March 15, 1967 Writs of Certiorari and Review were lodged with the Supreme Court of Louisiana and on March 27, 1967, the Supreme Court of Louisiana rendered an Order Refusing Writs.

The jurisdiction of this Honorable Court to review the decision of the Twenty-first Judicial District Court for the Parish of Tangipahoa is conferred by the provisions of 28 U.S.C., Sec. 1257 (3) (June 25, 1948, c. 646, 62 Stat. 929), since the validity of a City Ordinance, a State Constitutional provision and a State Statute are drawn into question as being repugnant to the Constitution of the United States. It is further urged that the constitutional rights guaranteed to Petitioner under the First, Sixth and Fourteenth Amendments to the United States Constitution have been abridged by virtue of the Judgment and conviction initially in the City Court of Hammond and as affirmed on appeal by the Twenty-first Judicial District Court for the Parish of Tangipahoa.

That Writ of Certiorari in the instant case should be directed to the Twenty-first Judicial District Court

for the Parish of Tangipahoa (the intermediate State Court but the Court of last resort for purposes of this Petition for Certiorari), where the Supreme Court of Louisiana has refused Writs of Certiorari and Review is supported by the decisions of this Honorable Court in *Michigan-Wisconsin Pipe Line Co. vs. Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L.Ed. 583 (1954) and *American Railway Express Co. vs. Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L.Ed. 140 (1923):

Pursuant to Rule 22 (1) of the Rules of this Honorable Court a Petition for Writ of Certiorari to review the Judgment of a State Court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within 90 days after the entry of such Judgment.

As further indicated in *American Railway Express Co. vs. Levee, supra*, the limit of time for applying to the Supreme Court of the United States was from the date the Writ of Certiorari was refused (263 U.S. at pages 20-21, 44 S. Ct. at page 12). Writs were refused by the Supreme Court of Louisiana on March 27, 1967, (Appendix "F", page 38) and as reflected by certified copy of said Decree which is a part of the transcript.

THE QUESTIONS PRESENTED FOR REVIEW.

(1) Whether the magazines involved in this proceeding are afforded the protection of the First and Fourteenth Amendments to the United States Constitution.

(2) Whether Ordinance No. 439 C.S., of the City of Hammond on its face and as construed and applied, abridges freedom of speech and press and deprives persons, including Petitioner, of their liberties without due process of law contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution, because:

(A) The Court below, in construing the Ordinance, applied arbitrary standards at variance with the standards enunciated by the Supreme Court in determining whether the distribution and sale of reading material is afforded the protection of the First and Fourteenth Amendments to the United States Constitution, and

(B) The Ordinance, on its face, established arbitrary standards at variance with and in contravention of those standards enunciated by the Supreme Court in determining whether the distribution and sale of reading material is afforded the protection of the First and Fourteenth Amendments to the United States Constitution.

(3) Whether, consistent with the due process requirements of the Fourteenth Amendment and the Constitutional Standards for judging obscenity as enunciated by the Supreme Court, a Judgment or conviction can be rendered against an accused without proof that the accused knew the contents of the ma-

terial, knew the publications to be obscene or believed the material involved violated the law.

(4) Whether the right to trial by jury, as guaranteed by the Sixth Amendment to the United States Constitution, is a provision of the Bill of Rights which is fundamental and essential to a fair trial in a First Amendment case and is made obligatory upon the States by the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS, THE CITY ORDINANCE AND THE STATE STATUTES INVOLVED.

This case involves the following Constitutional provisions:

(1) First Amendment to the United States Constitution providing:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) Sixth Amendment to the United States Constitution providing:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which dis-

trict shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

(3) Fourteenth Amendment to the United States Constitution and more particularly the due process provision thereof, which provides in pertinent part as follows:

"Section 1 * * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Ordinance No. 439 C.S., of the City of Hammond is involved in this case. Because of the length of this Ordinance, it appears as Appendix "G" page 39 of this Petition.

The following Constitutional Provisions of the State of Louisiana are involved in this case:

(1) Article 7, Section 36 of the Louisiana Constitution of 1921, as amended by Acts 1956, No. 607 and Acts 1958, No. 561. Pursuant to this Constitutional Provision, which appears as Appendix "H" page 42 of this Petition, all appeals from a sentence imposing a fine or imprisonment by a City Court shall be tried de novo and without juries with the District Courts having appellate jurisdiction.

(2) Article 7, Section 10 of the Louisiana Constitution of 1921, as amended by Acts 1958, No. 561, provides that the Supreme Court of Louisiana has jurisdiction on appeals in criminal cases only in those cases in which the penalty of death or imprisonment at hard labor may be imposed, or in which a fine exceeding $300.00 or imprisonment exceeding six months has been actually imposed. Article 7, Section 10 of the Louisiana Constitution is cited in full -- Appendix "I" page 43 of this Petition.

The following State Statute is involved in this case:

L.S.A.-R.S. 15:340 which provides:

"Every misdemeanor shall be triable by the Judge without the intervention of a jury."

STATEMENT OF THE CASE.

All Constitutional issues were raised initially in the City Court of Hammond and were reviewed on the trial de novo in the Twenty-first Judicial District Court for the Parish of Tangipahoa. Motion to Quash was filed in the City Court of Hammond on October 13, 1964 (Tr. 48). This Motion was based in part on the allegation that the Ordinance and Affidavit under which Petitioner was charged were unconstitutional and in violation of the First, Sixth and Fourteenth Amendments to the United States Constitution.

A Supplemental Motion to Quash the Amended Affidavit was filed on November 6, 1964 (Tr. 69) and again the provisions of the First, Sixth and Fourteenth

Amendments to the United States Constitution were urged.

As will appear from the Minutes of the City Court of Hammond of date March 3, 1965 (Tr. 115) original Motion to Quash and the Supplemental Motion to Quash were overruled by the Court.

On April 13, 1964, Motion for Trial by Jury was filed in the City Court of Hammond. Whereas the ruling of the Court does not appear in the Minutes of said Court, it does appear in Vol. 1, page 4 of the transcript of testimony in Proceeding No. 6771 of the City Court of Hammond in the matter entitled "*City of Hammond vs. Glen Conner*". The Court overruled the Motion for Trial by Jury "on the grounds and for the reason that the Laws of this State and particularly set forth and quoting:

> 'Every misdemeanor shall be triable by the Judge without the intervention of a jury. Therefore, this Court has no authority to, under the existing laws of Louisiana, grant a trial by jury.'"

This ruling of the Court was made on April 14, 1965. On that same date Application for Supervisory and Remedial Writs of Certiorari, Prohibition, Mandamus and Review to the City Court for the City of Hammond, State of Louisiana, were filed with the Supreme Court of Louisiana seeking trial by Jury (Tr. 103). The Application was denied (Tr. 107).

Certified copy of the record in No. 47,734 of the Supreme Court of Louisiana entitled "*City of Hammond vs. Glen Conner*" (relating to the Application for Remedial Writs, prior to the beginning of the trial and seeking a trial by jury has been filed together with this Petition for Certiorari).

On Appeal to the Twenty-first Judicial District Court for the Parish of Tangipahoa, which Appeal was on a trial de novo as provided by Article 7, Section 36 of the Louisiana Constitution (Appendix "H" page 42) all pleadings including the original and supplemental Motions to Quash were filed with the District Court as part of a "Motion for Filing of Pleadings on Behalf of the Defendant" (Tr. 123). The Motions to Quash were referred to the merits by the Court as appears at page 4 of the transcript of testimony in Proceeding No. 11,997 of the Twenty-first Judicial District Court for the Parish of Tangipahoa entitled "*City of Hammond vs. Glen Conner*".

As reflected by the Minutes of the District Court of date October 31, 1966, the Court overruled Motion for Trial by Jury made on behalf of Petitioner.

On October 8, 1964, the City of Hammond, on an Affidavit, charged the Petitioner, Glen Conner, with the following offense:

"Did sell obscene literature in violation of City Ordinance #439 C.S." (Tr. 44.)

On October 26, 1964, an Amended Affidavit was filed whereby the charge read verbatim as follows:

"Did intentionally sell or exhibit and had in his possession with the intent to sell or exhibit obscene magazines with the intent to primarily appeal to the prurient interest of the average person in violation of Section 1, Sub-sections B and C of Ordinance No. 439, C.S., of the City of Hammond, and did intentionally display nude pictures of a man, woman, boy or girl in his public place of business, said public place of business not being an art exhibit or art gallery, in violation of Section 1, Sub-section G of Ordinance No. 439, C.S., of the City of Hammond." (Tr. 67.)

In verdict rendered against Petitioner in the City Court on May 5, 1965, no particular magazines were specified as being obscene. On the appeal and trial de novo in the District Court the Judgment there rendered on December 1, 1966, also specified no particular magazines. However, by virtue of amendments to the Judgment, on January 27, 1967, and March 8, 1967, the Judgment of the District Court was amended to specifically declare that PLAYBOY and the two nudist publications (NUDISM TODAY—OFFICIAL CALENDAR and URBAN NUDIST) were not obscene.

Accordingly, since the Supreme Court of Louisiana has refused Writs the present status of the case is such that Petitioner stands convicted of a violation of the Obscenity Ordinance of the City of Hammond

with a specific declaration that three of the ten magazines forming the basis of the charge are not obscene.

The magazines that were the subject matter of the charge are the following:

ESCAPADE	—	December, 1964
DUDE	—	November, 1964
PLAYBOY	—	October, 1964
ROGUE	—	December, 1964
GENT	—	November, 1964
H.Q.	—	December, 1964
CAVALIER	—	October, 1964
KNIGHT	—	Vol. 41, Issue 9
NUDISM TODAY	—	OFFICIAL CALENDAR
URBAN NUDIST	—	Issue 14

The Magazines Are Afforded The Protection Of The First And Fourteenth Amendments To The United States Constitution.

It is respectfully submitted that the magazines which form the basis of the conviction of Petitioner are of a nature comparable to the magazines before this Honorable Court in *Austin vs. Kentucky*, No. 16 October Term, 1966 and *Gent vs. State of Arkansas*, No. 50 October Term, 1966, consolidated with *Redrup vs. State of New York* and reported as *Redrup vs. State of New York*, 87 S. Ct. 1414 (1967); and in fact, many of the magazines here involved do not go to the extremes in the treatment of sex as do some of the magazines in the aforesaid cases. It is submitted that

a review of the magazines themselves will indicate that these publications are protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, in personam or in rem as were the magazines in the *Austin* and *Gent* cases.

In this Honorable Court's per curiam in *Redrup vs. State of New York* rendered May 8, 1967, this Court indicated the varying views of the Justices of this Honorable Court as to what type of reading material, if any, is not afforded the protection of the First and Fourteenth Amendments to the United States Constitution against State action.

It is respectfully submitted that the magazines here involved do not meet the tests for obscenity followed by any members of this Honorable Court, that they clearly are not of such nature as to be proscribed by the State or any branch thereof civilly or criminally.

Arbitrary Standards Applied By Court Below.

In *Roth vs. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed. (2d) 1498 (1957) as elaborated upon in *Jacobellis vs. State of Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L.Ed. (2d) 793 (1964) and as further explained in *Memoirs vs. Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L.Ed. (2d) 1 (1966) it appears that this Honorable Court, at the very least, requires that three elements must coalesce in order for there to be a finding of obscenity, to-wit:

(A) The dominant theme of the material taken as a whole must appeal to a prurient interest in sex.

(B) The material must be patently offensive because it affronts contemporary community standards relating to description or representation of sex matters; and

(C) The material is utterly without redeeming social value.

The prosecution and its witnesses, both in the City Court and in the District Court, followed a novel course of procedure in attempting to carry the burden of proving to the Courts' satisfaction that the magazines were obscene. The witnesses made pronouncements as to the alleged obscenity of the magazines on the basis that they had never seen the magazines until they took the witness stand, that a casual perusal was sufficient to satisfy them that the magazines were obscene—despite the fact that many of the magazines contained lengthy articles and stories in addition to pictures. On the witness stand each witness would "thumb through" each of the magazines and would then pronounce his or her respective judgment thereon. In the District Court the first two witnesses were timed as they "thumbed through" the magazines. The first witness required twelve minutes to review ten magazines and the second witness required sixteen minutes (transcript of testimony in the District Court pp. 9, 36). Thereafter, it was stipulated that if additional witnesses were to be timed it would take them some fifteen to

twenty minutes to review all ten magazines by "thumbing through" them in the same manner as was the procedure with the first two witnesses. This Honorable Court's attention is particularly directed to transcript of testimony in the District Court at page 27 where the Attorney for the prosecution stated:

> "MR. CAUSEY:
>
> Please the Court. We will stipulate that our witnesses, none of our witnesses, to my knowledge, has read these things from cover to cover."

This fact is corroborated throughout the record by the testimony of the witnesses themselves (transcript of testimony in the District Court pp. 16, 88, 97, 98).

Counsel for Petitioner reserved Bill of Exception No. 1 (Tr. 161) when the Court overruled Counsel's objection to admissibility of testimony as to the contents of the magazines without witnesses first testifying that they had read the magazines in their entirety.

Thus, the witnesses were in no position to testify on "the dominant theme of the material taken as a whole" since they freely admitted that they had not read the material.

With regard to contemporary community standards, witnesses for Petitioner testified that in no

City, Town, Parish or County in the United States had these magazines been the subject matter of a charge of obscenity other than in the City of Hammond. If contemporary community standards in fact has reference to the Nation as a whole as suggested in *Jacobellis vs. State of Ohio, supra*, page 14, then it is apparent that this test was not met by the prosecution, for the witnesses for the prosecution were entirely from the environs of the City of Hammond and were not qualified as experts in the field of literature or any other calling that would give them special knowledge of the reading standards of the Nation at large.

Bill of Exception No. 3 was reserved when the Court overruled Counsel's objection to the giving of opinion evidence as to the prurient appeal of the magazines by persons not qualified as experts in any particular field that would give them such a wide degree of knowledge as to enable them to make such a pronouncement.

Witnesses for Petitioner testified as to the literary and artistic merit, the quality of the photographs and the humorous nature of many articles and cartoons appearing in the magazines and thus the argument could not and was not successfully made by the prosecution that the magazines were utterly without redeeming social value.

Accordingly, it is respectfully submitted that at the very least the three-fold test announced in

Jacobellis vs. State of Ohio, supra, page 14, and reiterated in *Memoirs vs. Massachusetts, supra,* page 14, were not met by the prosecution. Therefore, whatever standards were applied by the Court in making its determination were standards at variance with those established by this Honorable Court.

The Ordinance, On Its Face, Is Unconstitutional.

In the case of *Mishkin vs. State of New York,* 383 U.S. 502, 86 S. Ct. 958, 16 L.Ed. (2d) 56 (1966) this Honorable Court held that States are free to adopt other definitions of "obscenity" only to the extent that those adopted stay within the bounds set forth by the constitutional criteria of the *Roth* definition.

Ordinance No. 439 C.S., of the City of Hammond (Appendix "G" page 39) relates "primary appeal" to the intent of the defendant rather than to the materials. The Obscenity Ordinance of the City of Hammond is identical to the Obscenity Statute of the State of Louisiana, La.R.S. 14:106 with the exception of the numbering of the paragraphs and the penalty provision.

In commenting on the State Statute and the questions here raised, the author in 23 Louisiana Law Review, page 608 made the following observations:

"The test in Roth—appealing to prurient interest—is applied to the statutory description of obscene *materials,* while the Louisiana statute

utilizes the test only in defining *defendant's intent*; defendant must have the *specific intent* to primarily appeal to the prurient interest.* * *"

* * *

"This variance of the subject of the obscenity tests leads to another difficulty; on its face the Louisiana statute's requirement that there be a primary appeal to the prurient interest may seem to satisfy Roth's requirement that the material be considered as a whole to determine its dominant theme. However, since this primary appeal refers to the *intent of the defendant, not to the materials*, it could be argued the dominant theme of the materials is ignored.* * *" (Emphasis supplied.)

It is respectfully submitted that the *City of Hammond* in adopting Ordinance No. 439 C.S., and defining obscenity in terms of the intent of the seller or distributor rather than in terms of primary appeal of the material itself has enacted legislation that does not stay within the bounds set by the constitutional criteria of the *Roth* definition.

Accordingly, it is respectfully submitted that the said Ordinance is unconstitutional in that it fails to provide minimum protection in the distribution, circulation and sale of reading material within the intendment of the First and Fourteenth Amendments to the United States Constitution as interpreted by this Honorable Court.

Scienter.

In *Smith vs. People of the State of California*, 361 U.S. 147, 80 S. Ct. 215, 4 L.Ed. (2d) 205 (1959) as recently again affirmed by this Honorable Court in *Mishkin vs. State of New York*, *supra*, page 18, the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.

In the instant proceeding, Petitioner did not testify. There was no testimony by any witnesses for the prosecution to even remotely suggest that the Petitioner had knowledge of the contents of the ten magazines forming the subject matter of the charge against him. The Manager of the distributor in Baton Rouge, Louisiana, that distributes magazines to Petitioner testified that his company distributes approximately sixteen hundred different titles each month to the Petitioner (transcript of testimony in the District Court p. 205).

In the absence of further proof on the part of the prosecution, it would have to be assumed that the Petitioner has knowledge of the contents of a minimum of sixteen hundred different magazines and periodicals, and knew of the alleged obscenity of the seven on which he stands convicted, in order to reach a finding that the requisite scienter was present to such an extent as to support a conviction for the violation of the Obscenity Ordinance of the City of Ham-

mond. There is not a scintilla of evidence in the record that would support such a finding.

Thus, the very fundamental question is presented as to whether a retailer of magazines and periodicals, the free circulation, distribution and sale of which is protected by the First and Fourteenth Amendments to the United States Constitution can legally be convicted of a charge of obscenity without proof that he knew the contents of the material, knew the publications to be obscene or believed the material involved violated the law.

Trial By Jury In A First Amendment Case.

The Constitution of the State of Louisiana, Article 7, Section 36, prohibits a trial by jury in a criminal case that goes on appeal de novo to a District Court (Appendix "H" page 42).

L.S.A.-R.S. 15:340 specifically provides that "every misdemeanor shall be triable by the Judge without the intervention of a jury". The City Court Judge invoked this Statute in denying to Petitioner the right to trial by jury. Thus, under existing constitutional provisions and Statutes of the State of Louisiana and pursuant to the rulings of the Courts below, Petitioner was not afforded a right to trial by jury.

This Honorable Court recognized (although it did not pass upon) the question in *Quantity of Copies of Books vs. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed.

(2d) 809 (1964) that the right to trial by jury in a First Amendment case is a substantial question.

In a dissenting opinion in *Kingsley Books vs. Brown*, 354 U.S. 436, 447, 77 S. Ct. 1325, 1331; 1 L.Ed. (2d) 1469 (1957) Mr. Justice Brennan in a dissenting opinion stated:

> "I believe the absence in this New York obscenity statute of a right to a jury trial is a fatal defect. * * *"
>
> * * *
>
> * * A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene.* * *"

In *Singer vs. United States*, 380 U.S. 24, 85 S. Ct. 783, 13 L.Ed. (2d) 630 (1965) this Honorable Court traced the history of right to trial by jury from the days of "English Common Law" through "The Colonial Experience" and to "The Constitution and Its Judicial Interpretation" as of the current day. In that history this Honorable Court pointed out that in all but "petty offenses" a jury trial was a constitutional imperative, referring to federal criminal cases.

In *Gideon vs. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed. (2d) 799 (1963) this Honorable Court for the first time extended the provision of the Sixth Amendment to the United States Constitution providing for the right to counsel to an accused in a State criminal proceeding. This Honorable Court made it clear that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment.

The Sixth Amendment to the United States Constitution also provides for the right to trial by jury.

It is respectfully submitted that the question really is whether a First Amendment case is in the category of a "petty offense"; for the rule in *Gideon* has even been extended to serious misdemeanors by holdings of the Federal Courts in *Harvey vs. State of Mississippi*, 340 F. (2d) 263 (1965) and *McDonald vs. Moore*, 353 F. (2d) 106 (1965), both decided by the United States Court of Appeals for the Fifth Circuit.

It is respectfully submitted that the suppression by the State, or a branch thereof, of written publications, which are presumed (until proved otherwise) to have the protection of the First Amendment to the United States Constitution is not merely a "petty offense". If it is not a "petty offense" then the guarantees of the Sixth Amendment to a trial by jury are equally as "fundamental and essential to a fair trial" as is the right to Counsel; and through the Fourteenth Amendment to the United States Constitution this right should extend to trial in First Amendment cases in the State Courts.

Accordingly, it is respectfully submitted that Petitioner, although asserting his right to trial by jury from the outset of this litigation and having been denied that right by the State Constitution, a State Statute, the Trial Court where the action was instituted, the District Court on Appeal and the Supreme Court of the State, has been deprived of his constitutional guarantees to a fair trial under the First and Fourteenth Amendments to the United States Constitution.

It is respectfully submitted, as evidenced by the foregoing facts that substantial federal questions are involved in this Petition for Certiorari. The very fundamental rights guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution are involved in this case. It is submitted that Petitioner stands charged and convicted in an unconstitutional proceeding brought under an unconstitutional Ordinance and accordingly, it is respect-

fully requested that this Honorable Court grant Writ of Certiorari to review the Judgment of the Twenty-first Judicial District Court for the Parish of Tangipahoa pursuant to which Petitioner stands convicted to the end that the said Judgment and conviction might be reversed and set aside.

Respectfully submitted,

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Attorneys for GLEN CONNER, Petitioner,

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APPENDIX A.

VERDICT OF CITY COURT OF HAMMOND, MAY 5, 1965.

City of Hammond vs. No. 6771 Glenn Conner, Continued.

Minutes of Wednesday, May 5, 1965:

Pursuant to previous recess, trial was again resumed in this case. Present: His Honor Allen B. Pierson, Judge Presiding; Hon. John D. Kopfler and Hon. Gordon E. Causey, Attorneys for Plaintiff, City of Hammond; Hon. William M. Lucas, Jr., Attorney for Defendant, Glenn Conner; Mr. Glenn Conner, Defendant; Chief of Police H. Brooks Robinson, Dy. Marshal of Court; and Mrs. Lorraine M. David and Mrs. Nellwin Fagan Null, Dy. Clerks of Court.

Mr. Causey opened by stating that the City of Hammond offered no rebuttal and then proceeded to close the City's case, presenting his closing arguments to the Court, with Mr. Lucas answering for the defense.

After the City closed its case, the Court rendered a verdict of Guilty as Charged. Mr. Lucas then filed a Motion for a New Trial, which was over-ruled by the Court.

The defense then waived the delay for sentencing, and the defendant, Glenn Conner, being ready for sentence was asked if he had anything to say why the sentence of the law should not be imposed upon

him and he having replied the Court sentenced him to a fine of $100.00 and Cost or 30 days in jail.

Mr. Lucas then presented to the Court, both orally and written, a Motion for Appeal. Mr. Kopfler and Mr. Causey, Attorneys for City of Hammond, were both given copies of same.

Then, by the Court: LET AN ORDER OF APPEAL enter herein, returnable to the Twenty-First Judicial District Court, for the Tangipahoa Parish, Amite, Louisiana, on or before June 7, 1965, upon the Defendant furnishing Bond in the amount of FIVE HUNDRED AND NO/100 ($500.00) DOLLARS same to be in the form of an Appearance Bond.

The Court then ordered the Clerk of Court not to wait for the transcript of this trial, before sending the case to Amite.

Court was then ordered adjourned until Monday, May 10, 1965.

APPENDIX B.

MINUTE ENTRY OF JUDGMENT OF THE TWENTY-FIRST JUDICIAL DISTRICT COURT FOR THE PARISH OF TANGIPAHOA OF DECEMBER 1, 1966, AFFIRMING JUDGMENT OF THE CITY COURT OF HAMMOND.

December 1, 1966.

This day Court convened at 9:30 A.M. pursuant to previous order of adjournment. Present His Honor, Ben N. Tucker, Judge Presiding, Duncan S. Kemp, District Attorney, Estelle S. Stire, Clerk of Court and Thomas I. Sanders, Sheriff.

Appeal from City Court of Hammond

City of Hammond
vs. no. 11,997
Glen Conner

This day the defendant was personally present in open Court accompanied by his attorney, Mr. William Lucas. City of Hammond not represented by counsel. This matter having previously been tried, came up on this day for verdict to be rendered by the Court. Oral reasons for judgment were read in open Court and the verdict of the lower Court was affirmed. Whereupon, counsel for defendant filed a Motion for a Rehearing in the case and the Court overruled the Motion with the attorney or Assistant Attorney for the City of Hammond not being present at the time of the

rendition of such ruling. Counsel for the defendant did not object to the ruling of this motion being rendered in the absence of the counsel for the City of Hammond. Counsel for defendant filed a Notice of Intention to Apply for Writs of Certiorari, Review, Mandamus and Prohibition and Court stay imposition of sentence until February 1, 1967.

APPENDIX C.

REASONS FOR JUDGMENT OF THE TWENTY-FIRST JUDICIAL DISTRICT COURT FOR THE PARISH OF TANGIPAHOA.

21ST JUDICIAL DISTRICT COURT
PARISH OF TANGIPAHO
STATE OF LOUISIANA

Filed Dec. 2, 1966
/s/ Frances A. Piazza
Dy. Clerk of Court

CITY OF HAMMOND
VS. NO. 11997
GLEN CONNER

ON APPEAL FROM THE CITY COURT OF HAMMOND, SEVENTH WARD, PARISH OF TANGIPAHOA, STATE OF LOUISIANA, HONORABLE ALLEN B. PIERSON, JUDGE PRESIDING

REASONS FOR JUDGMENT.

This case reaches us on appeal from the verdict of the City Court of Hammond convicting the defendant of a violation of Ordinance No. 499 C.S. regularly adopted by the City of Hammond, and the consequent imposition by the Trial Court of a $100.00 fine and cost of court or thirty days in jail sentence.

The defendant reasserts and realleges here all of the preliminary motions which he filed in the Trial

Court, consisting mainly of the original and supplemental motions (1) to quash the affidavit on which the prosecution was premised, (2) bills of particulars, and (3) for a trial by jury.

The Ordinance in question deals with the intentional production, sale, exhibition, gift or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition * * * book, magazine * * * and so forth.

In his motion to quash defendant strongly contends that the affidavit is wholly defective in that same is duplicitous because he is charged disjunctively or alternatively with selling *or* exhibiting the questioned materials, and under the provisions of Article 222 of the Louisiana Code of Criminal Procedure, since the two alleged infractions (selling or exhibiting) constitute two separate and distinct offenses, the charges must be recited in a conjunctive rather than a disjunctive manner, and in support thereof he cites the case of City of Shreveport v. Bryson, 33 So 2d 60 in which the defendant was charged with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs as authority for the proposition that the affidavit in the instant case must fall because the gravamen in the Bryson case is not followed in the subject affidavit, is, therefore, not apprised of the exact nature of the offense with which he is charged. We do not believe that the problems with which the Court was confronted in the Bryson

case are analogous to the present situation. While defendant's point is well taken to the effect that subsequent pleadings such as the City's answers to the motions for bill of particulars cannot create a defect nor remedy one in an affidavit or bill of information the terminology, selling or exhibiting, is not so dissimilar in context as to pose uncertainty in the mind of an accused with respect to the precise accusation with which he is charged. There was no such similarity in the meaning of the disjunctive language used in the affidavit before the Court in the Bryson case.

Defendant further urges as a ground for his motion to quash that the Ordinance and the Statute of the State of Louisiana, R.S. 14:106 which it tracks and follows are invalid and unconstitutional for the reason that it is an unwarranted and illegal impingement on the right of free speech and press protected by the 1st, 10th and 14th Amendments to the Federal Constitution and the correlative constitutional provisions of this State, and that the Ordinance and Statute do not follow the guidelines for determining obscenity as enunciated by the United States Supreme Court in the case of Roth v. United States 77 S. Ct. Rptr. 1304 and other Federal decision of like import. Defendant contends that the test prescribed by the Federal Jurisprudence, as particularly epitomized by the Roth case appealing to the prurient interest—deals with the statutory description of obscene materials, while the Louisiana Statute uses this test only in defining defendant's intent, and several cases are cited, the holdi

ings of which are claimed to illustrate the unsoundness of this statutory approach. It is argued that as the Ordinance and Statute are presently confected conceivably a distributor of magazines or books, not by accepted standards obscene in nature, could, if his intention was to incite the prurient interest of his purchasers, be adjudged guilty of violating the law, when the material exhibited or sold, was not legally obscene. Of course, such a result would be intolerable, and in derogation of the rights protected by the Constitutional provisions against impingement on freedom of speech. It would seem, however, that the wording of the Statute does not ignore the Roth test with respect to the necessity of considering the dominant theme of the material, since such words as lewd, lascivious, and filthy are used in describing objectionable material legislated against. Moreover, in view of the holding by our Supreme Court in the case of State v. Roufa, 129 So. 2d that R.S. 14:106 (2) is constitutional and valid, we are bound by and constrained to follow this decision. True, the attack on the Statute in the Roufa case was directed at its validity under the freedom of speech and due process amendments to the Federal and State Constitutions, whereas, defendant here also levels his thrust on the additional ground that invalidity attaches to the Statute and Ordinance for failure to utilize the wording necessary to come within the four corners of the rationale expounded in the Roth case for the determination of what actually constitutes obscenity. It is well to mention that the Supreme Court of Louisiana in the Roufa case made mention of the Roth case without noting

any lack or failure in the Statute occasioned by the reasoning in Roth.

On the merits objections were interposed to the witnesses using the word "obscene" in describing the contents of the questioned magazines for the reason that this determination lay within the province of the Court. These objections were allowed to go to the effect of such testimony. The Court is perfectly aware that the responsibility for deciding whether the magazines in evidence are obscene, with the dissemination of such putting the defendant in violation of the Ordinance, rests with the Court. Without going into detail we hold the opinion that the contents of the great majority of the magazines which defendant was charged with distributing come within the legal definition of obscenity, and the dominant theme in the materials contained in most of the magazines at issue taken as a whole would appeal to the prurient interest of the average person, applying contemporary community standards. With one or two exceptions the magazines are totally devoid of redeeming features and do not elicit any social importance.

The verdict of the Lower Court will be affirmed.

AFFIRMED.

APPENDIX D.

ORDER OF THE TWENTY-FIRST JUDICIAL DISTRICT COURT FOR THE PARISH OF TANGIPAHOA OF DATE JANUARY 27, 1967, AMENDING JUDGMENT OF DECEMBER 1, 1966.

ORDER

Considering the foregoing motion, it is ordered that the judgment herein rendered on December 1, 1966 be amended only to the following extent:

The Court finds that the October 1964 issue of Playboy Magazine introduced in evidence is not obscene.

(S.) BEN N. TUCKER,

(Ben N. Tucker),
Judge, Div. B. 21st Judicial District Ct.

Amite, Louisiana
January 27, 1967

APPENDIX E.

ORDER OF THE TWENTY-FIRST JUDICIAL DISTRICT COURT FOR THE PARISH OF TANGIPAHOA OF DATE MARCH 8, 1967, FURTHER AMENDING JUDGMENT OF DECEMBER 1, 1966.

ORDER

Considering the foregoing motion, it is ordered that the judgment herein rendered on December 1, 1966 be further amended only to the following extent:

The Court finds that Nudism Today "Official Calendar" and Urban Nudist "Issue 14", introduced into evidence as exhibits C-11 and C-12 are not obscene.

Amite, Louisiana this 8th day of March, 1967.

(S) BEN N. TUCKER,
(Ben N. Tucker),
Judge, 21st Judicial District Court.

APPENDIX F.

SUPREME COURT OF LOUISIANA—REFUSAL OF WRITS OF CERTIORARI AND REVIEW, MARCH 27, 1967.

Supreme Court of Louisiana
NEW ORLEANS, 70112

March 27, 1967

No. 48,635

City of Hammond
v.
Glen Conner

In re: Glen Conner applying for writs of certiorari and review

WRITS REFUSED. Since the violation of a city ordinance is not a crime, a prosecution for such violation is not governed by the procedural rules applicable to prosecutions for offenses against the State. See City of New Orleans vs. Adjmi, 249 La. 346, La., 186 So. (2d) 616 (1966) overruling City of Shreveport vs. Bryson, 212 La. 534, La., 33 So. (2d) 60 (1947); also City of New Orleans vs. Cook, ... La. ...., La., 191 So. (2d) 634 (1966). Further, we find no error of law with respect to the other complaints made by relator.

(S) EHMcG
(S) JBF
(S) JBH
(S) FWH
(S) WBH
(S) JWS
(S) FWS

APPENDIX G.

OBSCENITY ORDINANCE OF THE CITY OF HAMMOND

ORDINANCE No. 439 C. S.

AN ORDINANCE DECLARING OBSCENITY TO BE A MISDEMEANOR; SETTING FORTH THE VARIOUS OFFENSES THAT AMOUNT TO OBSCENITY: AND PRESCRIBING THE PENALTIES FOR THE VIOLATION HEREOF.

BE IT ORDAINED BY THE COMMISSION COUNCIL OF THE CITY OF HAMMOND, LOUISIANA:

SECTION 1: Obscenity is the intentional:

(A) Exposure of one's person in a public place in such manner that any part of a sex organ may be seen by another person, with the intent of arousing sexual desire.

(B) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other

means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(C) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph 2 above, with the intent to primarily appeal to the prurient interest of the average person.

(D) Performance by any person or persons in the presence of another person or persons with the intent of arousing sexual desire, of any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement.

(E) Solicitation or attempt to entice any unmarried person under the age of seventeen years to commit any act prohibited by this section.

(F) Requirement by a person, as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine book, periodical or publication to a purchaser or consignee, that such purchaser or consignee receive for resale any other article, book or publication reasonably believed by such purchaser or consignee to contain articles or material of any kind or description which are designed, intended or reasonably calculated to or which do in fact appeal to the prurient interests of the average person in the community, as judged by contemporary community

standards, or the denying or threatening to deny any franchise or to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles or things or by reason of the return thereof.

(G) Display of nude pictures of a man, woman, boy or girl in any public place, except as works of art exhibited in art galleries.

SECTION 2: In prosecutions for obscenity, lack of knowledge of age or marital status shall not constitute a defense.

SECTION 3: Whoever commits the crime of obscenity shall be fined not more than One Hundred Dollars ($100.00), or imprisoned for not more than ninety days, or both.

SECTION 4: Be it further ordained that all ordinances or parts of ordinances in whatsoever manner they may conflict with this ordinance are hereby repealed and made null and void.

SECTION 5: Since this ordinance directly affects the public health, safety and welfare, this ordinance shall become effective immediately upon adoption.

ADOPTED BY THE COMMISSION COUNCIL OF THE CITY OF HAMMOND, LOUISIANA, THIS 2ND DAY OF JUNE, 1964

(S) JOHN C. MORRISON
Mayor

(S) JANE ALLEN
Secretary

Published June 11, 1964.

APPENDIX H.

LOUISIANA CONSTITUTION OF 1921 AS AMENDED, ARTICLE 7, § 36.

§ 36. Appellate jurisdiction; trials de novo

Section 30. The district courts have appellate jurisdiction, except as otherwise provided in this Constitution, of the following cases: All appeals in civil cases tried by justices of the peace within their respective districts; all appeals in civil cases tried in city or municipal courts within their respective districts where the amount in dispute, or the value of the movable property involved does not exceed one hundred dollars, exclusive of interest; all appeals from orders of justices of the peace requiring a peace bond; and all appeals from sentences imposing a fine or imprisonment by a mayor's court or by a city or municipal court. These appeals shall be tried de novo and without juries; but no evidence shall be admitted on the trial de novo which was not offered in the lower court unless it is shown to the satisfaction of the court that, despite the exercise of reasonable diligence by the party offering it, such evidence could not have been produced at the trial in the court below. (As amended Acts 1956, No. 607, adopted Nov. 6, 1956; Acts 1958, No. 501, adopted Nov. 4, 1958).

APPENDIX I.

LOUISIANA CONSTITUTION OF 1921, AS AMENDED, ARTICLE 7, § 10.

§ 10. Supervisory, original and appellate jurisdiction

Section 10. The Supreme Court has control of, and general supervisory jurisdiction over all inferior courts.

It has exclusive original jurisdiction of disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as the court may adopt; of suits for the removal from office of judges of courts of record as elsewhere provided in this Constitution; and of the determination of questions of fact affecting its own appellate jurisdiction in any case pending before it, and to that end, it may make such orders and decrees as it may deem proper.

In civil cases, its appellate jurisdiction extends to both the law and the facts. In criminal matters, its appellate jurisdiction extends to questions of law only.

The following cases only shall be appealable to the Supreme Court:

(1) Cases in which the constitutionality or legality of any tax, local improvement assessment, toll or impost levied by the state or by any parish, municipality, board or subdivision of the state is contested;

(2) Cases in which an ordinance of a parish, municipal corporation, board or subdivision of the state, or a law of this state has been declared unconstitutional;

(3) Cases in which orders of the Public Service Commission are in contest, as is provided in Article VI, Section 5 of this Constitution;

(4) Appealable cases involving election contest, but only if the election district from which the suit or contest arises does not lie wholly within a court of appeal circuit; and

(5) Criminal cases in which the penalty of death or imprisonment at hard labor may be imposed, or in which a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed.

If a case is appealed properly to the Supreme Court on any issue, the Supreme Court has appellate jurisdiction over all other issues involved in the case. (As amended Acts 1958, No. 561, adopted Nov. 4, 1958).

APPENDIX J.

CROSS REFERENCES TO TRANSCRIPT CITATIONS, LOUISIANA SUPREME COURT, DISTRICT COURT, CITY COURT.

As indicated at page 3 of this Petition for Certiorari, all transcript references quoted in the Petition, except as otherwise indicated, are references to the duplicate certified copy of the Record in *City of Hammond vs. Glen Conner,* No. 48,635 Supreme Court of Louisiana, since the copy of the transcript of the Twenty-first Judicial District Court for the Parish of Tangipahoa and index thereto were not completed at the time of the preparation of Petition for Certiorari. This Appendix has been added subsequent to completion of the transcript in the District Court which includes transcript in the City Court, and accordingly, cross references are here made for the convenience of this Honorable Court to all transcript references appearing in the foregoing Petition for Certiorari.

DOCUMENT	TRANSCRIPT REFERENCES		
	Louisiana Supreme Court	Twenty-first Judicial District Court for the Parish of Tangipahoa	City Court of Hammond
Affidavit	44	—	2
Amended Affidavit	67	—	10
Motion to Quash	48	15-A	4
Supplemental Motion to Quash the Amended Affidavit	69	15-D	12

	Louisiana Supreme Court	Twenty-first Judicial District Court for the Parish of Tangipahoa	City Court of Hammond
Minutes of City Court of Hammond reflecting the overruling of Motion to Quash and Supplemental Motion to Quash	115	—	1-B
Application for Supervisory and Remedial Writs of Certiorari, Prohibition, Mandamus and Review to the City Court for the City of Hammond	103	—	45
Denial of Application for Remedial Writs RE: Trial by Jury	107	—	42
Motion for Filing of Pleadings on behalf of Defendant refiling in the District Court all of the Motions filed in the City Court	123	15	—
Petition for Rehearing	143	31	—
Minutes of the District Court reflecting refusal of Rehearing	143	4	—
Notice of Intention to Apply to the Louisiana Supreme Court for Writs of Certiorari and Review	152	60	—

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CONNER *v.* CITY OF HAMMOND.

ON PETITION FOR WRIT OF CERTIORARI TO THE TWENTY-FIRST JUDICIAL DISTRICT COURT, LOUISIANA, PARISH OF TANGIPAHOA.

No. 259. Decided October 23, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Twenty-first Judicial District Court for the Parish of Tangipahoa, Louisiana, is reversed. *Redrup* v. *New York*, 386 U. S. 767.

MR. JUSTICE HARLAN would affirm the judgment of the state court upon the premises stated in his separate opinion in *Roth* v. *United States*, 354 U. S. 476, 496, and in his dissenting opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.